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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 REBECCA FLUGSTAD, and
12 BENJAMIN FLUGSTAD,

13 Plaintiffs,

14 v.

15 UNITED STATES OF AMERICA,
16 DEPARTMENT OF THE INTERIOR,
17 U.S. FISH and WILDLIFE SERVICE,
18 LAEL SWANSON and JOHN DOE
SWANSON, and the marital community
composed thereof,

Defendant.

CASE NO. 13-5192 RJB

ORDER ON UNITED STATES'
MOTION TO DISMISS

19 This matter comes before the Court on the United States' Motion to Dismiss. Dkt. 20.
20 The Court has considered the pleadings filed in support of and in opposition to the motion, and
21 the file herein.

22 On March 14, 2013, Plaintiff filed this case asserting a negligence claim against the
23 United States and others stemming from an injury Mrs. Flugstad suffered when she was startled
24 by a horse and fell from a trail in the Dungeness National Wildlife Refuge ("Dungeness" or "the

1 refuge”). Dkt. 1. Now ripe is the United States’ Motion to Dismiss, where it asserts that this
2 Court lacks subject matter jurisdiction over Plaintiffs’ claim against it because of the
3 discretionary function exception to Federal Tort Claims Act (“FTCA”) liability, found at 28
4 U.S.C. § 2680(a). Dkt. 20. For the reasons set forth below, the discretionary function exception
5 applies and the Plaintiffs’ negligence claim against the United States should be dismissed.

6 **I. BACKGROUND FACTS AND PROCEDURAL HISTORY**

7 **A. BACKGROUND FACTS ON DUNGENESS**

8 Dungeness was established by Woodrow Wilson in an Executive Order in 1915, for the
9 purpose of creating “ . . . a refuge, preserve, and breeding ground for native birds . . .” Dkt. 20-3,
10 at 14. It is situated on the northern coast of Washington’s Olympic Peninsula along the Strait of
11 Juan de Fuca. Dkt. 20-3. Dungeness encompasses 773 acres and contains Dungeness spit, the
12 longest natural sand spit in the United States, as well as tidelands and upland forest habitat. Dkt.
13 20-4, at 1. It has diverse ecosystems, and is home to thousands of bird, animal, and plant
14 species. *Id.*

15 Dungeness is managed by the United States Fish and Wildlife Service and is a part of the
16 National Wildlife Refuge System. Dkt. 20-3. The mission of the National Wildlife Refuge
17 System “is to administer a national network of lands and waters for the conservation,
18 management, and where appropriate, restoration of the fish, wildlife, and plant resources and
19 their habitats within the United States for the benefit of present and future generations of
20 Americans.” 16 U.S.C. § 668dd(a)(2). In administering the System, the Secretary of the Interior
21 is instructed, in part, to “ensure that the mission of the System . . . and the purposes of each
22 refuge are carried out;” “plan and direct the continued growth of the System in a manner that is
23 best designed to accomplish the mission of the System;” and to “recognize compatible wildlife
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1 dependant recreational uses as the priority general public uses of the System through which the
2 American public can develop an appreciation for fish and wildlife.” *Id.* at § 668dd(a)(4)(A), (C)
3 and (H). The Secretary of the Interior is authorized to prescribe regulations to “permit the use of
4 any area within the System, for any purpose, including but not limited to hunting, fishing, public
5 recreation, and accommodation and access whenever he determines that such uses are
6 compatible with the major purposes for which such areas were established.” *Id.* at §
7 668dd(d)(1)(A).

8 Some of the recreational uses that are permitted in Dungeness are hiking and horseback
9 riding. Dkt. 20-3. To that end, there are two trails that cross some 74 acres of forested uplands
10 in the refuge. Dkt. 22, at 1. The main trail starts at the parking lot, leads visitors to a lookout
11 point, and then onto the beach where visitors can hike the Dungeness Spit to the lighthouse. Dkt.
12 22, at 1-2. The upper portion of the main trail is between 8 to 10 feet wide to the lookout point,
13 and is wheelchair accessible. *Id.* The primitive trail is an unpaved dirt trail around 3 to 4 feet
14 wide. *Id.* It loosely parallels the main trail and joins the main trail at the lookout point. *Id.*
15 From there (the last 500 feet or so) of the joined trails to the beach is about ten feet wide but is
16 rather steep, and is not wheelchair accessible. *Id.* On this lower portion of the trail, there are
17 wooden erosion control walls in some areas on the upslope side of the trail, and some retaining
18 sections on the downslope side. *Id.* Hikers and horseback riders share the lower portion of the
19 trail. *Id.*

20 **B. VISITOR ENHANCEMENT AND TRAILHEAD PROJECT AND TRAIL**
21 **RECONSTRUCTION PROJECT AT DUNGENESS**

22 In 2010, an improvement project was initiated by the Fish and Wildlife Service for
23 Dungeness, which included the Visitor Enhancement and Trailhead Project, for the construction
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1 of a 3,000 square foot visitor information area, and a Trail Reconstruction Project. Dkt. 30, at 2.
2 Both projects were part of the same contract. *Id.*

3 As a result, in 2011, the trails in Dungeness were reconstructed by a private contractor,
4 P.F. Pepiot, based on a design by another private contractor, Walker Macy. Dkt. 21, at 1. Fish
5 and Wildlife Service Landscape Architect, Elizabeth Ludvigsen, was the contracting officer's
6 representative, and was responsible for administering the contract with the private entities. Dkt.
7 21, at 1. There were two objectives in the Trail Reconstruction Project. Dkt. 21, at 2. The first
8 was to make the upper portion of the trail handicap accessible. *Id.* The second objective related
9 to the lower portion of the trail and was to 1) repair erosion damage, 2) clean drainage ditch and
10 pipes, 3) rehabilitate the trail surface, and 4) install new and reconstruct existing retaining walls
11 on the inslope. *Id.* Project specifications call for the contractor to build a "firm durable,
12 permeable tread surface for the trailhead and the trail." Dkt. 27, at 37. In some areas of the
13 lower trail, vegetation was used to maintain the integrity of the trail. Dkt. 27, at 40. In other
14 areas, particularly where it is very steep and there was little vegetation to stop erosion, the trail
15 contained "footboards" on the edge. Dkt. 27, at 40. These footboards existed prior to the
16 rehabilitation of the trail. Dkt. 30, at 4. No new footboards were included in the contract for the
17 trail. *Id.*

18 **C. MRS. FLUGSTAD FALLS OFF THE HIKING TRAIL IN 2012**

19 On May 6, 2012, Plaintiffs Mr. and Mrs. Flugstad were hiking up the lower portion of the
20 refuge's trail from the beach. Dkt. 27, at 9. Three horseback riders were dismounted and
21 leading their horses up the trail behind the Flugstads. Dkt. 27, at 11-12. Mrs. Flugstad testified
22 that as the horses overtook them on the trail, she noticed that the lead horse appeared anxious.
23 *Id.*, at 16. Defendant Lael Swanson was leading this horse. Dkt. 1. Mrs. Flugstad became
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1 fearful of the horse, and so stepped off the trail onto the soft downslope edge. *Id.*, at 17. A
2 witness on the beach, Jeffrey Pearson, testified that he was watching and when Mrs. Flugstad
3 stepped off the trail, saw her ankle roll and then she fell. Dkt. 27, at 24. One of the horseback
4 riders, Amanda White, testified that she saw Mrs. Flugstad, who was “very close to the edge,”
5 take a step back, stumble, grab a branch, and then the ground gave way beneath her. Dkt. 27, at
6 28-29. In any event, Ms. Flugstad fell about 20 feet. Dkt. 1, at 4. She landed on a log, fractured
7 her C6 vertebra and seriously injured her spine. Dkt. 1, at 4. There was no footboard along the
8 edge of the trail where Ms. Flugstad fell, but there was significant vegetation. Dkt. 27, at 29 and
9 40.

10 **D. PROCEDURAL HISTORY**

11 Plaintiffs filed this case against the United States and Lael Swanson on March 14, 2013.
12 Dkt. 1. In it, Plaintiffs contend that the United States was negligent in failing to protect the
13 safety of visitors, “including taking reasonable steps to protect the safety of pedestrians in the
14 vicinity of horses,” and failing to design, construct, and maintain the refugee’s trail in a safe
15 manner. Dkt. 1, at 5. Plaintiffs also make a negligence claim against Ms. Swanson for failing to
16 exercise ordinary care while “operating a horse.” *Id.*, at 5. Plaintiffs seek damages against both
17 Defendants. *Id.*

18 **E. PENDING MOTION**

19 The United States now moves to dismiss Plaintiffs’ negligence claim, arguing that it is
20 immune from suit under the discretionary function exception to the FTCA. Dkts. 20, and 29.
21 The United States here argues that there was no federal statute, regulation, or administrative
22 policy that mandated 1) what uses (including horseback riding) be allowed in Dungeness, 2)
23 which safety hazards are to be identified and mitigated on the trails in Dungeness, or 3) or how
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1 to achieve all the objectives of the trail reconstruction, and so the challenged actions involved
2 exercise of judgment. *Id.* It further argues that the decisions related to actions were susceptible
3 to, and were based on, social, economic, and political policy considerations. *Id.* The United
4 States argues, accordingly, that all these decisions were discretionary, and so Plaintiffs' claim
5 against it should be dismissed. *Id.*

6 Plaintiffs oppose the motion, but acknowledge that they are not now challenging the
7 "well settled issues" of appropriate use determinations (like allowing horseback riding), safety
8 hazard analysis of the trail, or project design considerations. Dkt. 26, at 8.

9 Accordingly, to the extent the Complaint makes claims based on those theories, the
10 discretionary function exception applies and Plaintiff's negligence claim against the United
11 States on those issues should be dismissed.

12 Plaintiff argues, instead, that it is the government's negligent implementation of the trail
13 rehabilitation project and failure to maintain improvements on federal land that subject it to the
14 jurisdiction of this Court. Dkt. 26.

15 **II. DISCUSSION**

16 **A. STANDARD FOR MOTION TO DISMISS**

17 A complaint must be dismissed under Fed. R. Civ. P. 12(b)(1) if, considering the factual
18 allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the
19 Constitution, laws, or treaties of the United States, or does not fall within one of the other
20 enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or
21 controversy within the meaning of the Constitution; or (3) is not one described by any
22 jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v.*
23 *Tinnerman*, 626 F.Supp. 1062, 1063 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal
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question jurisdiction) and § 1346 (United States as a defendant). When considering a motion to dismiss pursuant to Rule 12(b)(1), the court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983).

B. FTCA AND THE DISCRETIONARY FUNCTION EXCEPTION

The United States, as sovereign, is immune from suit unless it consents to be sued. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995). The FTCA is a limited waiver of sovereign immunity, rendering the United States liable for certain torts of federal employees. *See* 28 U.S.C. § 1346(b). The FTCA provides,

Subject to the provisions of chapter 171 of this title, the district courts, . . . , shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

Among the exceptions to the FTCA waiver of sovereign immunity is the “discretionary function exception.” It excludes:

Any [§ 1346] claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

1 28 U.S.C. § 2680(a). “The discretionary function exception insulates certain governmental
2 decision-making from judicial second guessing of legislative and administrative decisions
3 grounded in social, economic, and political policy through the medium of an action in tort.”
4 *Myers v. U.S.*, 652 F.3d 1021, 1028 (9th Cir. 2011)(*internal citations omitted*). “The government
5 bears the burden of proving that the discretionary function exception applies.” *Id.* Additionally,
6 “[t]he FTCA was created by Congress with the intent to compensate individuals harmed by
7 government negligence, and as a remedial statute, it should be construed liberally, and its
8 exceptions should be read narrowly.” *Terbush v. United States*, 516 F.3d 1125, 1135 (9th Cir.
9 2008).

10 A two step test is used to determine whether the discretionary function applies. *Terbush*,
11 at 1129 (*citing Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988)). In the first step, the
12 court determines “whether challenged actions involve an element of judgment or choice.” *Id.*
13 (*quoting Berkovitz*, at 536). If the challenged actions do involve an element of judgment or
14 choice, then the court turns to the second step in the test. *Id.* The second step requires the court
15 to decide “‘whether that judgment is of the kind that the discretionary function exception was
16 designed to shield,’ namely, ‘only governmental actions and decisions based on considerations of
17 public policy.’” *Terbush*, at 1130 (*quoting Berkovitz*, at 536-37). The exception applies even if
18 the decision is an abuse of discretion. *Id.* Each of the steps will be examined below.

19 1. Whether Challenged Actions Involved an Element of Judgment?

20 In the first step, the court determines “whether challenged actions involve an element of
21 judgment or choice.” *Terbush*, at 1130 (*quoting Berkovitz*, at 536-37). Under this step, the
22 “nature of the conduct, rather than the status of the actor” is examined. *Id.* “The discretionary
23 element is not met where ‘a federal statute, regulation, or policy specifically prescribes a course
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1 of action for an employee to follow.’” *Id.* (quoting *Berkovitz*, 486 U.S. at 536). The inquiry ends
2 if there is such a statute or policy directing mandatory and specific action because there can be
3 no element of discretion when an employee “has no rightful option but to adhere to the
4 directive.” *Id.*

5 The United States has carried its burden and shown that the challenged decisions here
6 involve an “element of judgment or choice” because they relate to the design of the trail. The
7 Plaintiffs argue that where the government establishes contractual standards and reserves to itself
8 the right to inspect work being performed on its behalf, it may create duties which the
9 government has no discretion to disregard. Dkt. 26 (citing *Kennewick Irrigation Dist. v. U.S.*,
10 880 F.2d 1018, 1030 (9th Cir. 1989) and *Camozzi v. Roland/Miller and Hope Consulting Group*,
11 866 F.2d 287 (9th Cir.1989)). Plaintiffs argue that the Fish and Wildlife Service here (through
12 the contractors) failed to construct the trail in conformance with contract requirements and so
13 disregarded mandatory duties in the reconstruction of the trail surface. Dkt. 26. Plaintiffs point
14 out that in the “Statement of Work” for the trail rehabilitation project, the trail was to have a
15 “firm[,] durable, permeable tread surface,” that the contract specifications require that the
16 “crushed basalt surfacing for the trail ‘shall have a smooth, tight, uniform surface true to line,
17 grade, and cross-section indicated on the Drawings’” and that the referenced “Drawings” “show
18 the trail cross section with edges supported by tapered shoulders having a 3:1 horizontal-to-
19 vertical slope.” Dkt. 26, at 11-12. Plaintiffs then argue that the “evidence shows that the lower
20 trail where the incident occurred did not conform to the firm and durable requirement and lacked
21 adequate support of the trail edges.” Dkt. 26, at 12. Plaintiffs note that footboards, which they
22 assert are used to support the trail surface, end just above where she fell. Dkt. 26, at 13.

1 It is undisputed that Ms. Flugstad stepped off the trail before she fell. Although Ms.
2 Flugstad does not testify where she was on the trail when she fell, she testified that:

3 The horse was right there. I felt that I needed to make another step to be out of
4 the way, because really – at that point I was afraid of the first horse. A hoof
5 meant blood; blood meant problems. I took the step, believing that I took it and
6 that action would have put me out of the danger of the horse. And the next thing I
7 know, I was in the air. . . . I realized I was free falling – this was not rolling down
8 the hill; this was free falling through the air.

9 Dkt. 27, at 17. Mr. Flugstad stated that Ms. Flugstad stepped into the dirt area to avoid the horse,
10 but not all the way into the vegetation. Dkt. 27, at 21. The witness on the beach, Mr. Pearson
11 testified that she was off the hard surface of the trail, onto the “dirt surface” right next to the
12 weeds when he saw her “ankle roll and then she fell.” Dkt. 27, at 24-25. Ms. White, another
13 horseback rider who was coming up behind Ms. Flugstad, testified that she saw her “very close
14 to the edge” already on the dirt shoulder when Ms. Flugstad stepped back again to avoid the
15 horse. Dkt. 27, at 28-29. Ms. White states that “[s]he was on the shoulder, took the step which
16 again, like I said, was on the edge and then it started to give, she grabbed a branch, caught
17 herself, and then the ground gave way.” Dkt. 27, at 29. Ms. White stated that she felt that Ms.
18 Flugstad “probably” stepped into the vegetation with her last step. Dkt. 27, at 29. Accordingly,
19 her claims regarding the trail surface are not helpful to her because she was not on the trail
20 surface when she fell.

21 Further, the United States properly points out that neither the Contract nor the Statement
22 of Work require the use of footboards on the lower portion of the trail. Dkt. 29. Design of the
23 trail included the use of vegetation as trail support in some areas in order to maintain a firm and
24 durable trail surface. Footboards existed on the trail in some areas before the renovation, but
were not added. The United States has shown that footboards were not installed not because of a

1 contract or inspection violation, but because they were not a part of the trail design. Plaintiffs
2 concede that trail design decisions are protected by the discretionary function exception.

3 Plaintiffs also argue that the trail failed to conform with the construction standards
4 incorporated into the contract, including the Architectural Barriers Act Accessibility Standard
5 2006 (“ABAAS”) because the trail surface was not “firm and stable” and the International
6 Building Code (“IBC”) because there should have been a guard rail on the trail. Dkt. 26, at 13-
7 14.

8 On the outset, the United States points out that the portion of the contract which
9 references the ABAAS and IBC related to the Visitor Enhancement and Trailhead Project and
10 not the Trail Reconstruction Project. Dkt. 29. (The Visitor Enhancement and Trailhead Project
11 involved the construction of a visitor shelter, kiosk and fee station and are buildings under these
12 codes.) It points out that the provisions are not applicable to this case because the event
13 happened on the lower portion of the trail. Further, as it relates to the ABAAS, it is undisputed
14 that Mrs. Flugstad moved off the trail surface before she fell. Moreover, the United States
15 properly points out that the IBC by its terms does not apply to trails. *See e.g.* IBC 101.2
16 (provisions of this code shall apply to the construction, alteration, movement, enlargement,
17 replacement, repair . . . of every building or structure). These codes do not provide a source of
18 mandatory action for the Fish and Wildlife Service.

19 The decision to omit footboards and guard rails on the lower portion of the trail were
20 discretionary decisions related to trail design. Plaintiff acknowledges that design decisions are
21 excluded by the discretionary function exaction.

22 Plaintiffs also argue that the government failed to inspect the trail to ensure that it
23 complied with the contract and failed to maintain the trail. Dkt. 26, at 16.
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1 These arguments are likewise not helpful to Plaintiffs. Plaintiffs fail to show that the
2 contractor committed a safety violation that the government failed to detect and that resulted in
3 her injuries. Plaintiffs have not shown that the trail was constructed in a manner which violated
4 the contract. Moreover, Plaintiffs fail to point to any specific maintenance issues.

5 Plaintiffs do not provide a mandatory directive in regard to the trail that officials did not
6 follow here. The design decisions here involved an element of judgment and choice – the
7 exercise of discretion. Accordingly, there being no statute or policy directing mandatory and
8 specific action, the Court must continue to the second step of the discretionary function
9 exception analysis. *Myers*, at 1028.

10 2. Whether the Judgment is of the Kind that the Discretionary Function
11 Exception was Designed to Shield – Decisions Based on Considerations of
12 Public Policy?

13 The second step requires the court to decide “‘whether that judgment is of the kind that
14 the discretionary function exception was designed to shield,’ namely, ‘only governmental actions
15 and decisions based on considerations of public policy.’” *Terbush*, at 1130 (*quoting Berkovitz*, at
16 536-37.) In this context, public policy has been understood to include decisions “‘grounded in
17 social, economic, or political policy.” *Terbush*, at 1130 (*quoting Varig*, at 814).

18 The government’s decision here to omit footboards and guard rails along the lower
19 portion of the trail is susceptible to policy analysis because in deciding whether to use these
20 devices, they had to balance the goals and mandates regarding the refuge with public access to
21 the refuge. Ms. Ludvigsen stated that she did not use footboards or guard rails in this portion of
22 the trail for several reasons noting:

23 This trail would be defined as a roaded-natural trail within the Recreational
24 Opportunity Spectrum (“ROS”). We are tasked with maintaining the trail and
 surrounding area in the DNWR as a predominately natural appearing
 environment. The facilities should harmonize with the natural environment.

1 Unnecessary footboards and guards are inappropriate in this setting. As I noted in
2 my prior declaration, in deciding how best to design the trail at the DNWR to
3 achieve the goals we were trying to accomplish, I had to ensure that the natural
4 resources were being conserved, the environment and wildlife species in the
5 refuge were being preserved, and the natural terrain and panoramic views were
6 being preserved. I also had to take into account and consider the particular
7 recreational setting for the Refuge, and the recreational setting for each portion of
8 the trail I was working on. At the same time, I had to consider and provide for
9 visitor expectation, enjoyment, and safety. Finally, all of these decisions had to
10 be made within the financial and budgetary constraints of the FWS at that time.

11 Dkt. 30, at 5.

12 Plaintiffs argue that while the design of the trail is protected by the discretionary function
13 exception, the implementation of that design was not protected. Dkt. 26. Plaintiffs, however, do
14 not point out a failure in the implementation of the trail design. Moreover, Plaintiffs citation to
15 *Whisnant v. United States*, 400 F.3d 1177 (9th Cir. 2005), is unhelpful. *Id.*

16 In *Whisnant*, the plaintiff worked in the commissary at the U.S. Naval base in Bremerton,
17 Washington. 400 F.3d at 1179. He brought suit against the United States for negligence under
18 the FTCA for injuries he sustained as a result of the government's failure to clean up toxic mold
19 which had accumulated at the commissary. *Id.* In rejecting the government's argument that the
20 decision not to clean up the mold was grounded in social, economic or political considerations,
21 the Ninth Circuit found, that "matters of scientific and professional judgment-particularly
22 judgments concerning safety-are rarely considered to be susceptible to social, economic, or
23 political policy," and that the failure to clean up mold there was a scientific and professional
24 judgment. *Whisnant*, at 1181. It held that the "decision to adopt safety precautions may be
based in policy considerations, but the implementation of those precautions is not.... [S]afety
measures, once undertaken, cannot be shortchanged in the name of policy." *Id.*, at 1182 (*internal*
quotation omitted). In acknowledging that the difficulty in distinguishing between what
governmental decisions regarding safety are based in social, economic, and political policy and

1 those that are not, the *Whisnant* Court reviewed other FTCA cases where safety had been an
2 issue. *Id.* “[I]n a suit alleging government negligence in the design and maintenance of a
3 national park road, we held that designing the road without guardrails was a choice grounded in
4 policy considerations and was therefore shielded under the discretionary function exception, but
5 maintaining the road was a safety responsibility not susceptible to policy analysis.” *Id.*, at 1181-
6 1182 (*citing ARA Leisure Servs. v. United States*, 831 F.2d 193, 195 (9th Cir.1987)).

7 The government has shown that decisions related to design of the trail implicated policy
8 concerns. Plaintiffs fail to show that the government did not adequately maintain the trail or
9 failed to properly implement a safety measure it had undertaken. Although in retrospect one can
10 conclude that footboards and/or a guard rail might be a good idea in that area of the trail, “that is
11 the sort of judicial second guessing of government decision-making that the discretionary
12 function exception was designed to protect.” *Bailey v. United States*, 623 F.3d 855, 863 (9th Cir.
13 2010).

14 3. Conclusion on Discretionary Function Exception Analysis

15 United States’ motion to dismiss (Dkt. 20) should be granted. Defendant United States is
16 immunized from Plaintiffs’ negligence claim based on the discretionary function exception.
17 Plaintiffs’ negligence claim against the United States should be dismissed.

18 Congress has given the Fish and Wildlife Service a safe harbor in the discretionary function
19 exception to a FTCA claim, even if “the discretion involved be abused.” 28 U.S.C. § 2680(a).

20 C. REMAINING STATE LAW CLAIM

21 Plaintiffs’ remaining claim is a claim for negligence against Lael Swanson and John Doe
22 Swanson, whom the Complaint alleges are residents of the State of Washington. Dkt. 1, at 2.
23 Plaintiffs are also alleged to be residents of Washington. *Id.*
24

1 Pursuant to 28 U.S.C. § 1367(c), district courts may decline to exercise supplemental
2 jurisdiction over a state law claim if (1) the claim raises novel or complex issues of state law, (2)
3 the state claim substantially predominates over the claims of which the district court has original
4 jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction,
5 (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
6 “While discretion to decline to exercise supplemental jurisdiction over state law claims is
7 triggered by the presence of one of the conditions in § 1367(c), it is informed by the values of
8 economy, convenience, fairness, and comity.” *Acri v. Varian Associates, Inc.*, 114 F.3d 999,
9 1001 (9th Cir. 1997)(*internal citations omitted*).

10 Here, all of the third condition in § 1367(c) has been met. All claims over which this Court
11 had original jurisdiction have been dismissed. The remaining claim is a state law claim against
12 non-diverse defendants. Moreover, the remaining state claims “raise novel or complex issues of
13 state law” under § 1367(c)(1). These are determinations for which the state court is uniquely
14 suited. Accordingly, the values of economy, convenience, fairness and comity may well be
15 served by this Court’s declining to exercise supplemental jurisdiction. *See Acri* at 1001.

16 Although “it is generally within a district court's discretion either to retain jurisdiction to
17 adjudicate the pendent state claims or to remand them to state court,” *Harrell v. 20th Ins. Co.*,
18 934 F.2d 203, 205 (9th Cir. 1991) in the interest of fairness, the parties should be given an
19 opportunity to be heard on whether the remaining claim should be dismissed without prejudice.
20 Parties should be ordered to show cause, if any they have, why the Court should not decline to
21 exercise supplemental jurisdiction and dismiss the remaining state law claim without prejudice.
22 Parties’ briefs, if any, are due January 10, 2014. Parties briefs should not exceed three pages.
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1 Consideration of the parties' responses to the Order to Show Cause should be noted for January
2 10, 2014.

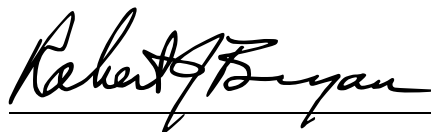
3 **III. ORDER**

4 Therefore, it is hereby **ORDERED** that:

- 5 • The United States' Motion to Dismiss (Dkt. 20) is **GRANTED**;
- 6 • Plaintiffs, negligence claim against the United States is **DISMISSED**;
- 7 • Parties are **ORDERED TO SHOW CAUSE**, if any they have, why the Court
8 should not decline to exercise supplemental jurisdiction and dismiss the remaining
9 state law claim without prejudice;
- 10 • Parties' briefs, if any, are due **January 10, 2014**; and
- 11 • Consideration of the parties' responses to the Order to Show Cause **IS NOTED**
12 for **January 10, 2014**.

13 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
14 to any party appearing *pro se* at said party's last known address.

15 Dated this 31st day of December, 2013.

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18 ROBERT J. BRYAN
19 United States District Judge
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